

Order Granting Motion for Voluntary Dismissal; Denying Motion to Dismiss as Moot; Further Scheduling Order
P:\PRO-SE\SJ.LHK\CR.10\Tatum418voldis.wpd

1 In his motion, Plaintiff clearly states his desire to dismiss the first due process claim as
 2 well as the retaliation claim in order to comply with Rule 20. Those claims named Defendants
 3 Uptergrove, James, Marvin, Cook, and Hirai. (Complaint at 6-8, 22-26.) However, in his
 4 motion, Plaintiff states that he “seeks to redress his remaining claims against Defendants D.
 5 Bradbury, R. Cox, T. Puget, D. Marvin and D. Rothchild.” (Motion at 2.) Contrary to Plaintiff’s
 6 statement, after the dismissal of the 2007 due process claim and the retaliation claim, there are
 7 no “remaining claims,” but rather, only one surviving claim. Moreover, although Plaintiff states
 8 that he would like to pursue his remaining claim against D. Marvin, it appears to be a
 9 misstatement because D. Marvin is not a named defendant in his sole surviving claim.

10 After consideration of the relevant pleadings, Plaintiff’s motion to voluntarily dismiss his
 11 first due process claim and his retaliation claim without prejudice is GRANTED. In light of this
 12 dismissal, Defendants’ motion to dismiss is DENIED as moot.

13 Plaintiff also requests that the Court lift its February 4, 2011 order staying discovery.
 14 Because Defendants’ motion to dismiss did not dispose of the entire action, Plaintiff’s request is
 15 GRANTED. The stay of discovery is hereby lifted.

16 CONCLUSION

17 1. Plaintiff’s motion to voluntarily dismiss claims is GRANTED. Defendants’
 18 motion to dismiss is DENIED as moot. Defendants Uptergrove, James, Cook, Hirai, and Marvin
 19 are DISMISSED from this action. The stay of discovery is lifted.

20 2. No later than **ninety (90) days** from the date of this order, Defendants shall file a
 21 motion for summary judgment or other dispositive motion with respect to the cognizable claim
 22 in the complaint.

23 a. If Defendants elect to file a motion to dismiss on the grounds that Plaintiff
 24 failed to exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a),
 25 Defendants shall do so in an unenumerated Rule 12(b) motion pursuant to *Wyatt v. Terhune*, 315
 26 F.3d 1108, 1119-20 (9th Cir. 2003).

27 b. Any motion for summary judgment shall be supported by adequate factual
 28 documentation and shall conform in all respects to Rule 56 of the Federal Rules of Civil

1 Procedure. **Defendants are advised that summary judgment cannot be granted, nor**
 2 **qualified immunity found, if material facts are in dispute. If Defendants are of the opinion**
 3 **that this case cannot be resolved by summary judgment, they shall so inform the court**
 4 **prior to the date the summary judgment motion is due.**

5 3. Plaintiff's opposition to the dispositive motion shall be filed with the Court and
 6 served on Defendants no later than **thirty (30) days** from the date Defendants' motion is filed.

7 a. In the event Defendants file an unenumerated motion to dismiss under
 8 Rule 12(b), Plaintiff is hereby cautioned as follows:¹

9 The defendants have made a motion to dismiss pursuant to Rule 12(b) of
 10 the Federal Rules of Civil Procedure, on the ground you have not exhausted your
 11 administrative remedies. The motion will, if granted, result in the dismissal of
 12 your case. When a party you are suing makes a motion to dismiss for failure to
 13 exhaust, and that motion is properly supported by declarations (or other sworn
 14 testimony) and/or documents, you may not simply rely on what your complaint
 15 says. Instead, you must set out specific facts in declarations, depositions, answers
 16 to interrogatories, or documents, that contradict the facts shown in the defendant's
 17 declarations and documents and show that you have in fact exhausted your
 18 claims. If you do not submit your own evidence in opposition, the motion to
 19 dismiss, if appropriate, may be granted and the case dismissed.

20 b. In the event Defendants file a motion for summary judgment, the
 21 Ninth Circuit has held that the following notice should be given to plaintiffs:

22 The defendants have made a motion for summary judgment by which
 23 they seek to have your case dismissed. A motion for summary judgment under
 24 Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your case.

25 Rule 56 tells you what you must do in order to oppose a motion for
 26 summary judgment. Generally, summary judgment must be granted when there is
 27 no genuine issue of material fact--that is, if there is no real dispute about any fact
 28 that would affect the result of your case, the party who asked for summary
 judgment is entitled to judgment as a matter of law, which will end your case.
 When a party you are suing makes a motion for summary judgment that is
 properly supported by declarations (or other sworn testimony), you cannot simply
 rely on what your complaint says. Instead, you must set out specific facts in
 declarations, depositions, answers to interrogatories, or authenticated documents,
 as provided in Rule 56(e), that contradict the facts shown in the defendants'
 declarations and documents and show that there is a genuine issue of material fact
 for trial. If you do not submit your own evidence in opposition, summary
 judgment, if appropriate, may be entered against you. If summary judgment is
 granted in favor of defendants, your case will be dismissed and there will be no

¹ The following notice is adapted from the summary judgment notice to be given to pro se
 prisoners as set forth in *Rand v. Rowland*, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). See
Wyatt v. Terhune, 315 F.3d at 1120 n.14.

1 trial.

2 *See Rand v. Rowland*, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff is advised to read
3 Rule 56 of the Federal Rules of Civil Procedure and *Celotex Corp. v. Catrett*, 477 U.S. 317
4 (1986) (holding party opposing summary judgment must come forward with evidence showing
5 triable issues of material fact on every essential element of his claim). Plaintiff is cautioned that
6 failure to file an opposition to Defendants' motion for summary judgment may be deemed to be a
7 consent by Plaintiff to the granting of the motion, and granting of judgment against Plaintiff
8 without a trial. *See Ghazali v. Moran*, 46 F.3d 52, 53-54 (9th Cir. 1995) (per curiam); *Brydges v.*
9 *Lewis*, 18 F.3d 651, 653 (9th Cir. 1994).

10 4. Defendants shall file a reply brief no later than **fifteen (15) days** after Plaintiff's
11 opposition is filed.

12 5. The motion shall be deemed submitted as of the date the reply brief is due. No
13 hearing will be held on the motion unless the court so orders at a later date.

14 6. All communications by the Plaintiff with the court must be served on Defendants,
15 or Defendants' counsel once counsel has been designated, by mailing a true copy of the
16 document to Defendants or Defendants' counsel.

17 7. Discovery may be taken in accordance with the Federal Rules of Civil Procedure.
18 No further court order is required before the parties may conduct discovery.

19 For Plaintiff's information, the proper manner of promulgating discovery is to send
20 demands for documents or interrogatories (for example, questions asking for specific, factual
21 responses) directly to Defendants' counsel. *See* Fed. R. Civ. P. 33-34. The scope of discovery is
22 limited to matters "relevant to the claim or defense of any party . . ." *See* Fed. R. Civ. P.
23 26(b)(1). Discovery may be further limited by Court order if "(i) the discovery sought is
24 unreasonably cumulative or duplicative, or is obtainable from some other source that is more
25 convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample
26 opportunity by discovery in the action to obtain the information sought; or (iii) the burden or
27 expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(2). In
28 order to comply with the requirements of Rule 26, before deciding to promulgate discovery

1 Plaintiff may find it to his benefit to wait until Defendants have filed a dispositive motion which
2 could include some or all of the discovery Plaintiff might seek. In addition, no motion to compel
3 will be considered by the Court unless the meet-and-confer requirement of Rule 37(a)(2)(B) and
4 N.D. Cal. Local Rule 37-1 has been satisfied. Because Plaintiff is detained, he is not required to
5 meet and confer with Defendants in person. Rather, if his discovery requests are denied and he
6 intends to seek a motion to compel, he must send a letter to Defendants to that effect, offering
7 them one last opportunity to provide him with the sought-after information.

8 8. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep the Court
9 and all parties informed of any change of address and must comply with the Court's orders in a
10 timely fashion. Failure to do so may result in the dismissal of this action for failure to prosecute
11 pursuant to Federal Rule of Civil Procedure 41(b).

12 IT IS SO ORDERED.

13 DATED: 3/29/11


LUCY H. KOH
United States District Judge